

BOARD OF APPEALS CASE NO. 4882

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BEFORE THE

APPLICANT: Shirley Angelini

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ZONING HEARING EXAMINER

**REQUEST: Special Exception for a day
care center in the R2 District;
200 Mountain Road, Fallston**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 4/7/99 & 4/14/99

HEARING DATE: May 12, 1999

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Record: 4/9/99 & 4/16/99

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Shirley Angelini, is trustee for the parcel of ground which is the subject of this hearing. Michael Euler and Joseph Deigert are the contract purchasers of the property.

The subject parcel is located at 200 Mountain Road in the Third Election District. The parcel is identified as Parcel No. 76, in Grid 3-C, on Tax Map 55. The parcel contains 47.83 acres, more or less, and portions of the parcel are zoned Agricultural, B3 General Business, and R2 Urban Residential.

The original application filed in this matter requested the following relief:

1. To extend the boundary line of the B3, General Business District 100 feet.
2. An adjustment of the B3 zoning boundary line for an additional 400 feet.
3. A variance to extend the zoning boundary line to be located within 300 feet of the parcel in the B3, R2 and AG Districts.
4. A Special Exception for an adult and child day care center in the R2 District.
5. A Special Exception for housing for elderly in an Agricultural District.
6. A variance for elderly housing in an AG District which is not located within the development envelope on the 1996 Land Use Element Plan and served by public water and sewer.

As a preliminary matter, the Applicant withdrew all requests for relief with the exception of a request for a Special Exception for a child day care center.

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Mr. Robert Rosenberger of Campbell and Nolan Associates, Inc., (CNA) was accepted as an expert in site plan design. He testified that the day care center was in essentially the same location as previously indicated on prior site plans. He indicated that portion of the property is zoned R2, has access on an arterial road, and was currently vacant. He said that existing screening on the subject property will be preserved and that property to the north of the subject property was proposed as the site of a single-family home, which will be compatible with homes in the area.

Mr. Rosenberger indicated that the original requested was for a two-story, 16,000 square foot facility. The witness said that the Applicant is now requesting a one-story, 8,000 square foot building. He said the building will be brick with a colonial appearance, and will be used for a maximum of 100 children. He said the hours of operation will be Monday through Friday, 6:30 a.m. to 6:30 p.m., and that a fenced play area will be constructed to the rear of the building. The witness went on to explain that no user has been selected to operate the facility at the present time and that the facility will operate from a private well and septic system. He testified that the site plan complied with all other applicable Zoning Code requirements.

Mr. Mickey Cornelius of the Traffic Group, Inc, was accepted as an expert traffic consultant. Mr. Cornelius said that he has reviewed all exhibits and was present for the testimony of Mr. Rosenberger. The witness said that he and his firm have performed a traffic analysis in connection with the request for the child day care center. He said that a right in and right out access point was proposed. He explained that a median strip currently separates the east and west bound lanes of MD Route 152 in front of the subject property and that the intersection of U.S. Route 1 and MD Route 152 was the prime intersection which would be affected by the proposed day care center. He testified that the intersection operates at a level of service "C" during the morning peak hour and a level of service "D" during the evening peak hour. He pointed out, based on data received from the State Highway Administration that the traffic volume on MD Route 152 to I-95 during the morning peak hour would be 1,000 vehicles and that no major improvements were planned for the road network. ITE trip generation reports for day care centers indicate that 40 cars will travel in and out of the site during the morning and evening peak hours.

Mr. Cornelius testified that for the purposes of analysis, he assumed a worst case

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scenario in which all traffic generated by the use would be added to the road network. He explained that even in the worst case scenario, the intersection of MD Route 1 and 152 still operated at a level of service "C" in the morning and a level of service "D" in the evening peak hours. He said day care centers typically have minor effect on traffic and indicated that a right in and right out access point on MD Route 152 was acceptable and that sight distance was appropriate. He explained that because no left turns will be made from the access point, less vehicle conflicts will take place and noted that final approval of the access must be granted by the State Highway Administration.

Mr. Cornelius pointed out that a detailed traffic impact analysis complying with the adequate public facility requirements will be prepared during the DAC approval process. He noted that a deceleration lane and improvements to the area to enable u-turns at the median would likely be required and would be appropriate for the use.

Mr. Cornelius then testified that, based on his experience, education and analysis, approval of the proposed day care center would not result in dangerous traffic conditions. Finally, he testified that the impact resulting from the proposed day care center from a traffic standpoint, would not differ in any material respect from the typical impact generated by a day care center being operated elsewhere in the R2 District in Harford County.

On cross-examination, Mr. Cornelius said that the data used in his analysis was compiled in February 1997, but that those records were the most recent available from the State Highway Administration and were appropriate for the analysis. Mr. Cornelius also said that there is nothing unique about the subject property from a traffic standpoint and that there are many similar uses on arterial roads which are divided by a median. He went on to testify that the median in front of the site on MD Route 152 would actually enhance traffic safety and was not a detriment from a traffic standpoint.

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The final witness to testify for the Applicant was Mr. William Monk, who was accepted as an expert land planner. Mr. Monk said that he was familiar with the Staff Report and exhibits and was present for the testimony of Mr. Rosenberger and Mr. Cornelius. Mr. Monk testified that, based on his review of the Code, the site plan, the Staff Report, and testimony, the proposed use complied with all requirements of the Zoning Code. He said that because the use is residential in nature and given the conditions of approval recommended by the Staff Report, the use would be compatible with other uses permitted as of right in the R2 District. He said that granting the Special Exception would not cause any adverse impact to surrounding properties and no adverse traffic impact would occur.

He further testified that the proposed day care center as described by Mr. Rosenberger would not generate adverse effects difference in character or intensity from the effects inherent in the operation of a children's day care center elsewhere in the R2 District. Mr. Monk testified that he agreed with the Staff analysis of the "Limitations, Guides and Standards" set forth in Section 267-9(l) of the Code.

Mr. Anthony S. McClune, Manager, Division of Land Use Management for the Department of Planning and Zoning, testified on behalf of the Staff. Mr. McClune said that he participated in the preparation of the Staff Report. He indicated that the Department had reviewed the Applicant's amended request and found it met or exceeded all requirements set forth in Section 267-53 dealing with Special Exceptions under the Code. He further indicated that the amended request met or exceeded all "Limitations, Guides and Standards" set forth in Section 267-9(l) of the Zoning Code and that, accordingly, the Department recommended approval of the Applicant's amended request, provided that the four conditions of approval set forth in the Staff Report are imposed.

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Several area residents testified in opposition to the Applicant's request. Most of the area residents expressed concern with respect to traffic impact which may be caused by the day care center. One area resident expressed concern about fire department access, another area resident expressed concern about school buses using the site, and some of the area residents expressed concern about the ages of children who would be attending the day care center, use of private well and septic, the possibility of people using the day care center as a means of getting a boundary exception to place their children in the Fallston schools, and finally, the compatibility of the center with the surrounding neighborhood.

CONCLUSION:

The Applicant in the original application, among other things, requested the relief as set forth above. However, on the evening of the hearing, the Applicant withdrew all requests except the request for a day care center.

Section 267-53(C)(4) of the Code provides:

(a) These uses may be granted in the AG, RR, R, R1, R2, R3, R4 and VR Districts, provided that:

- [1] A minimum parcel area of one-half acre is established.
- [2] Access to the facility shall be from an arterial or collector road, with all outdoor play areas located in a solid-fenced or screened area in the rear of the building.
- [3] The operation may be conducted in a previously existing structure, or, if a new structure is constructed, the architecture of the building shall be harmonious with other architecture within the neighborhood.
- [4] If the operator of a day-care center operated in a church, private school or public school has obtained a zoning certificate under the provisions of § 267-26(D)(12) of this chapter, the day-care center is exempt from the requirements of this Subsection C(4).

Under Section 267-51 of the Zoning Code, Special Exceptions may be granted when determined to be compatible with the uses permitted as of right in the appropriate district by the Code.

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The Courts in Maryland have had occasion to discuss the burden of proof that must be met by an Applicant in a Special Exception case.

Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely effected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981) ("Schultz").

While the Applicant in such a case has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543 (1973) ("Turner").

The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. See Schultz at 432 A.2d 1327.

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A.2d 716, 724 (1974) ("Anderson").

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In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995) (“Mossburg”), the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone. In reversing the Circuit Court, which upheld the Board’s decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. the Court said,

The question in the case sub judice, therefore, is not whether a solid waster transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an Applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.

Thus, the Court of Special Appeals emphasized that once the Applicant shows that it meets the requirements for the special exception under the statute, the burden then shifts to the protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the protestants fail to meet that burden of proof, the requested special exception must be approved.

The evidence introduced by the Applicant clearly shows that the Applicant has met the burden of proof to justify the granting of the requested special exception. The evidence presented by Messrs. Rosenberger, Monk and McClune, and through the Staff Report, confirms that the Applicant meets or exceeds every Code requirement regarding the request. The testimony of Mr. Cornelius, a qualified traffic expert, indicates that approval of the request would not adversely effect traffic impacts.

The evidence presented shows that any adverse impact from the project would not be

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significantly different in character or intensity from the effects inherent in the operation of a day care center irrespective of its location in the R2 zone. Thus, the test set forth in Schultz has been met. Therefore, the burden shifts to the protestants to show that impacts from the use at the particular location are greater at that location than elsewhere within the R2 zoning district.

Most of the protestants who testified expressed concern about additional traffic impact, one expressed concern about fire department access, another about school buses using the site, and some others expressed concern about the age of the children who would attend the day care center and whether approval of the day care center would allow users of the center to obtain boundary exception to place their children in the Fallston schools.

Virtually all of the protestants expressed concern about additional traffic. The protestants did not argue that the use would be unsightly, impact property values, etc. Under Mossburg, after the testimony of the Applicant's experts, the burden of proof shifts to the protestants to show that impacts from the use at this particular location are greater than elsewhere. The protestants did not introduce traffic data, whereas the Applicant's expert witness testified that it was his opinion that a 100 child day care center would generate 40 trips an hour during the a.m. peak period and an additional 40 trips an hour during the p.m. peak period, plus the trips generated by the day care staff.

In the Anderson at 329 A.2d 719, Judge Davidson for the Court of Special Appeals pointed out that unsupported conclusions of witnesses to the effect that a proposed use will or will not result in harm amounts to nothing more than vague and generalized expressions of opinion which are lacking in probative value. The Court noted that a qualified traffic expert testified that, based on traffic studies he performed, no traffic impact would result from approval of the special exception. The protestants testified that increased traffic would be undesirable and that the use would cause traffic congestion. The Court pointed out that there was no facts provided to support the testimony of the protestants. The Court found that, therefore, the testimony of the protestants was totally devoid of probative value and was, in effect, no evidence at all.

Therefore, the testimony of the protestants in the instant case, when carefully reviewed, can only be described as vague, unsupported and generalized fears which do not constitute

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probative evidence. Conversely, Mr. Cornelius, a qualified traffic expert, testified with respect to traffic impact which would result from the proposed use based on a study he performed which analyzed existing conditions and referred to the standard reference source recognized by Harford County and virtually every jurisdiction in the United States to predict traffic generation, the ITE trip generation rate manual.

Mr. Cornelius further pointed out that the State Highway Administration would have final approval over the access to the site and that a complete traffic study would be prepared and analyzed at the time of the site plan approval. Mr. Cornelius further testified that virtually all of the traffic impact about which the protestants complained will be mitigated or eliminated by the imposition of conditions. Mr. Cornelius said that very few new trips will be created by the facility since most people seeking day care choose facilities which are on their way to work and are, therefore, already on the road network.

As was in the case in Anderson, the testimony of the protestants did not rebut that of Mr. Cornelius or that contained in the Staff Report. The protestants called no expert witnesses to rebut the testimony of Mr. Monk, Mr. Rosenberger and Mr. McClune regarding non-traffic impacts. All requirements of the Code are met. That the architectural rendering of the proposed building was not submitted with the application is irrelevant. A one-story, 8,000 square foot, brick building with a colonial design and screening, as proposed, will clearly be harmonious with other architecture in the neighborhood. It is important to note that the Code does not give the protestants the right to approve the final design of the proposed day care center. The Code merely provides that the Applicant must insure that the architecture of the building will be harmonious with the neighborhood. A condition of approval giving the Department of Planning and Zoning final approval over the building should be sufficient to address any legitimate concerns over this issue.

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Therefore, it is the recommendation of the Hearing Examiner that the Special Exception for the day care center be approved, subject to the following conditions:

1. The maximum area of the day care center shall be 8,000 square feet.
2. The Applicant shall submit a traffic impact analysis which complies with the standards of the growth management provisions of the Harford County Code and specifically addresses turning movement and safety concerns regarding the ingress and egress for the day care center. Such analysis must be reviewed and approved by Harford County and the State Highway Administration. The Applicant shall construct such improvements as are identified in the analysis as necessary for traffic safety.
3. The Applicant shall submit a site plan, including a landscaping and lighting plan, for review by the Development Advisory Committee.
4. The building shall be one-story in size and have a brick exterior. The Applicant shall submit a rendering of the building to the Department of Planning and Zoning for review and approval. Such rendering shall demonstrate that the structure will be harmonious with existing residences in the vicinity.

Date JULY 6, 1999

**L. A. Hinderhofer
Zoning Hearing Examiner**